No. 92-2013 (2)

Supreme Court, U.S
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NANCY O'MARA EZOLD,

Petitioner,

v.

WOLF, BLOCK, SCHORR and SOLIS-COHEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT WOLF, BLOCK, SCHORR and SOLIS-COHEN

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QUESTION PRESENTED

Whether the Court of Appeals improperly applied Rule 52(a) when it set aside as "clearly erroneous" the District Court's ultimate finding of pretext, which was predicated upon a performance evaluation comparison that ignored the legitimate, non-discriminatory reason articulated by Respondent for its partnership decision, namely, Petitioner's deficiency in the criterion of legal analytical ability.

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BRIEF IN OPPOSITION OF RESPONDENT WOLF, BLOCK, SCHORR and SOLIS-COHEN

SUMMARY OF ARGUMENT

This case involves a claim of gender discrimination arising out of the decision by Respondent Wolf, Block, Schorr and Solis-Cohen ("Wolf") not to admit Petitioner to the partnership. The legitimate, non-discriminatory reason articulated by Wolf for that decision was its assessment that she lacked sufficient legal analytical ability to handle the responsibilities of a partner in the Firm's complex litigation practice. (App. 38a-39a). As the Third Circuit recognized, there had been long-standing, widespread and contemporaneously-documented criticisms of her legal analytical ability (App. 14a-24a, 54a-55a), even by partners supporting her candidacy (App. 24a, 40a, 55a, 69a), and none of those criticisms was found pretextual by the District Court. (App. 53a).

In a comprehensive 93-page opinion, reflecting a diligent examination of the voluminous trial record and a well-reasoned application of settled law under Title VII and Rule 52(a), a unanimous panel of the Third Circuit (Judges Hutchinson, Seitz and Cowen) held that the District Court's ultimate finding of pretext was "clearly erroneous" because it was improperly predicated upon "invalid comparisons" and "find[s] no support in the evidence." (App. 49a, 93a). As the Third Circuit stated, the District Court's selective comparison of certain of the written evaluations of Petitioner and eight male candidates ignored Wolf's articulated rea-

son for its partnership decision — Petitioner's deficiency in the criterion of legal analytical ability — and thus disregarded the many negative evaluations of Petitioner and the many positive evaluations of the male candidates in that criterion. (App. 49a-69a). The District Court's comparison, characterized by the Third Circuit as a "pick and choose" approach (App. 44a), focused instead upon evaluations favorable to Petitioner and critical of the male candidates in criteria other than legal analytical ability. (App. 44a-46a). In its comparison, the District Court also ignored male associates who, like Petitioner, had received favorable evaluations in various criteria other than legal analysis but nonetheless, like Petitioner, were passed over for partnership because of insufficient legal analytical ability. (App. 69a-71a).

In addition to setting aside the District Court's ultimate pretext finding as "clearly erroneous," the Court of Appeals further concluded that the evidence was "insufficient to permit a rational factfinder to infer that Wolf's assertion that Ezold was wanting in legal analytic ability was a mask for unlawful sex discrimination." (App. 37a-38a). Her Petition for Rehearing In Banc was denied by the entire 12-member Court of Appeals without dissent. (App. 161a-162a).

Petitioner has greatly mischaracterized and distorted the Third Circuit's opinion. The linchpin of her "Questions Presented" and Petition is the repeated, erroneous assertion that the Court of Appeals has enunciated a rule that subjective decisions by professional employers must be accorded "special deference" (Pet. at i, 6, 8, 9, 10, 11, 17, 20), "blind deference" (Pet. at 14), or "virtually unreviewable deference." (Pet. at 8). Building further on this straw-man argument, Petitioner repeatedly asserts that the "special deference" requirement supposedly adopted by the Third Circuit constitutes a "new standard" or "new rule" that conflicts with "legions" of cases from other circuits "dating back more than twenty years" admonishing trial courts to review subjective employment decisions with caution because they can readily be utilized to mask discrimination. (Pet. at 9, 14-16).

No matter how many times Petitioner claims that a "new rule" of "special deference" has been created by the Third Circuit, the fact remains that the Court did *not* purport to announce any such rule, nor did its decision effectively create such a rule. Not surprisingly, the Petition does not cite or quote any portion of the opinion setting forth the purported "special deference" requirement,

because it does not appear anywhere in the opinion. Thus, this case does not present for this Court's consideration the questions posed by the Petition, and certiorari should be denied for that reason alone. (Pet. at i). Moreover, there is nothing unprecedented or remarkable in the opinion, which routinely applied to the particular facts and findings in this case this Court's decisions under Rule 52(a) and the settled law governing determinations of pretext,[1] including numerous cases applying Title VII in the closely analogous context of academic tenure decisions (which Petitioner does not even address, let alone distinguish).

The purported inter-circuit conflict that Petitioner claims the Third Circuit has created is chimerical. Despite her arguments (Pet. at 9, 14-16), the Court did not disagree with the universally accepted principle that subjective employment decisions should be reviewed carefully to ensure that they are not camouflaging discrimination. To the contrary, the Court cited with approval (App. 31a) its decision in *Fowle v. C & C Cola*, 868 F.2d 59, 64 (3d Cir. 1989), which agrees with other circuits that subjective decisionmaking should be scrutinized with care, and its thorough opinion in this case did exactly that.

Nor has any conflict been created by the Third Circuit's admonition that factfinders should "avoid unnecessary intrusion into subjective promotion decisions" and refrain from disturbing such decisions "unless they can be shown to have been used as the mechanism to obscure discrimination." (App. 42a). Partnership decisions in large law firms, like academic tenure decisions, entail evaluations of subjective criteria by a large group of evaluators, often engendering good-faith differences of opinion.[2] The circuit

1. Despite the Petition's contentions about "sex stereotyping" and "direct evidence of Wolf, Block's discriminatory attitudes toward women" (Pet. at 4, 5), the Third Circuit emphasized the acknowledgment by Petitioner's counsel that she tried this case on a pretext theory, not a mixed-motives theory. (App. 4a at n. 1, 29a). The District Court also recognized that this case was tried on a pretext theory, as it quotes the framework for pretext cases set forth in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981) (App. 128a), and makes no mention of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Nor did the District Court cite *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), since Petitioner made no hostile working environment claim. (App. 92a).

2. This Court's decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991-92 (1988), pointed out that "[o]pinions often differ when managers and supervisors are evaluated, and the same can be said for many jobs that involve . . . complex and subtle tasks like the provision of professional services. . . ."

courts cited by Petitioner that require careful scrutiny of subjective decisionmaking have also consistently held in the academic and professional context that the mere existence of differences of opinion concerning an employee's qualifications does not suffice to establish pretext; that is what the Third Circuit held here. The Courts of Appeals have uniformly stressed that factfinders are not empowered under Title VII to resolve those differences of opinion by substituting their judgment for that of the employer.

In addition to attempting to manufacture the appearance of a circuit conflict, Petitioner repeatedly invokes hyperbole to ascribe all manner of dire consequences to the Third Circuit's decision. For example, Petitioner claims that, as a result of the decision, "the equal employment laws will be a dead letter for any jobs where performance is not measured solely by quantitative standards." (Pet. at 19). Petitioner also asserts that "no female or minority professional employee could ever pierce the protective wall the Court of Appeals has erected around law firms and other employers of professionals." (Pet. at 14). She further claims that the Third Circuit "has enacted an exemption to the equal employment laws for lawyers and other professionals" (Pet. at 20), and warns that the decision "effectively guarantee[s] that the employer will prevail in any discrimination case involving professional employees." (Pet. at 9).

These *in terrorem* claims are wholly unfounded. It simply defies credulity to suggest that Title VII's protections for professional women and minorities were eviscerated by the distinguished panel that rendered the unanimous decision here, and that an opinion with such draconian consequences would have been countenanced by the entire 12-member Court of Appeals, which denied the Suggestion for Rehearing In Banc without dissent. The Third Circuit did not "blindly defer" to Wolf's decision to pass over Petitioner for partnership. To the contrary, the Court of Appeals twice emphasized that subjective decisions by professional employers "*are not insulated from judicial review for unlawful discrimination*." (App. 42a, 51a) (emphasis added).

The Third Circuit's meticulous review of the record and its carefully considered opinion reflect a fulfillment of its Rule 52(a) obligation to review the entire record to determine whether the findings were "clearly erroneous" and whether there was any evidence that would permit a rational factfinder to infer pretext or

discrimination. Its fact-driven decision, which comports fully with the precedents of this Court and other circuits, represents a faithful application of established law and thus does not warrant a grant of certiorari. *See, e.g., Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 859 (1982) (White, J., concurring) ("[I]f the issue presented in the petitions for certiorari had been whether the clearly-erroneous standard, although properly invoked, was erroneously applied, it is doubtful in my mind that this fact-bound issue would have warranted certiorari."); *Id.* at 864 (Rehnquist, J., concurring) (Whether district court's findings are clearly erroneous "is a question best decided by the courts of appeals, who have a good deal more experience with the application of this principle than we do. . . .").

COUNTERSTATEMENT OF THE CASE

1. Petitioner's Statement of the Case, like the District Court's findings, ignores the fact that her written evaluations reflected significant and repeated criticisms of her legal analytical ability by numerous partners throughout her career at Wolf. (App. 14a-24a, 54a-55a). As the Third Circuit pointed out, "[e]valuations in Ezold's file not mentioned by the district court show that concerns over Ezold's legal analytical ability arose early during her tenure at the firm" and "continued up until, and through, her 1988 senior associate evaluation, the year she was considered for partnership." (App. 14a, 17a). These concerns about her legal analytical ability were not confined to just a few critics. The evaluations disclosed that "[e]ven Ezold's strongest supporters acknowledged the shortcomings in her legal analytical ability" and "persistently expressed doubts about her ability to meet the firm's criterion of legal analysis." (App. 55a, 69a, 24a, 40a).

Contrary to the Petition's repeated misstatements that the District Court "credited substantial evidence of the bias of the evaluators" (Pet. at 5, 7, 11), the Court of Appeals stressed that "*the district court never made a finding that the critical evaluations were themselves incredible or a pretext for discrimination.*" (App. 53a) (emphasis added). Significantly, although the District Court adopted verbatim more than 100 of Petitioner's Proposed Findings, it chose *not* to adopt any of her numerous Proposed Findings attacking the credibility of the evaluators and the *bona fides* of

the evaluations critical of her legal analytical ability. (Third Circuit App. 380a-393a; 410a-418a). Nor did the District Court make any finding that the negative assessments of Petitioner's legal analytical ability formed by the 10-member Associates Committee, the 5-member Executive Committee and its former Chairman William Rosoff (who independently reviewed Petitioner's evaluations at the request of the Executive Committee) had been fabricated to mask sex discrimination. The criticisms of her legal analytical ability were contemporaneously memorialized in numerous documents, and she acknowledged that they were conveyed to her at various performance reviews which long preceded her discrimination claim.[3] (App. 16a, 17a, 20a-21a, 25a).

As the Third Circuit recognized, the record showed that legal analysis was always listed as the first criterion on Wolf's evaluation forms and, although associates were measured against all twenty criteria, "legal analytic ability is a *necessary condition* for partnership at Wolf. . . ." (App. 10a, 39a n. 17) (emphasis added). The Court of Appeals stressed that "[t]he record does not show that anyone was taken into the partnership without serious consideration of their strength in the category of legal analytic ability." (App. 39a). As it also pointed out, the evaluation files revealed that Male Associates 1 and 2, like Petitioner, "were highly rated by a number of partners" in criteria other than legal analysis, but were nevertheless passed over for regular partnership because "the Associates Committee determined their ability in legal analysis fell below the firm's standards." (App. 70a). The Court of Appeals criticized the District Court for ignoring these two male associates in its comparison of evaluations, noting that Wolf's decision not to admit them because of their deficient legal analytical ability "adds support to our conclusion that the District Court's finding that Wolf's asserted legitimate reason . . . was a sham cannot be supported on a theory of discriminatory application." (App. 70a).

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3. For instance, as reflected in a contemporaneous memorandum of Petitioner's performance review held two years before the partnership decision, she was told that a number of lawyers "had strong negative sentiments about her capabilities and they feel she has a number of shortcomings in the way of complicated analysis of legal problems and in being able to handle the big complicated corporate litigation, and therefore, does not meet the standard for partnership at Wolf, Block. . . . [We] urged Nancy to seriously consider looking for employment elsewhere as she may not be able to turn the tide." (App. 17a).

Partners who supported Petitioner's candidacy acknowledged that she did not possess sufficient legal analytical ability to handle complex litigation matters independently and thus did not satisfy the Firm's partnership admission standard. (App. 24a, 40a, 55a, 69a). Nevertheless, they advocated modifying that standard in her case because of her other attributes. (App. 24a-26a, 40a). However, based upon the consensus of the Associates Committee[4] and the independent determination by Mr. Rosoff that Petitioner lacked sufficient legal analytical ability to handle complex litigation matters, the Executive Committee unanimously decided not to recommend her admission as a partner.[5] (App. 25a, 26a). At the same time, a female candidate was admitted and a male candidate was passed over. (App. 25a). As the District Court found, Petitioner later voluntarily quit Wolf despite assurances "she could stay as long as she wanted" and "would be considered for partnership in the future." (App. 126a-128a at Nos. 139, 142, 151; 27a).

Although there was no evidence that Wolf had ever allowed a male candidate's attributes in other criteria to overcome a deficiency in legal analysis (App. 39a), the District Court apparently believed, like some of Petitioner's supporters, that the Executive Committee should have done so in her case. (App. 43a-44a). As the Court of Appeals recognized (App. 43a), the District Court simply disagreed with the wisdom of Wolf's partnership standard when it declared: "In the magnitude of its complexity, a case may

4. Petitioner does not mention that the 9-1 vote against her candidacy by the Associates Committee did not split along gender lines, as a female partner from her own Department voted against her admission. (App. 24a and n. 11).

5. A few months later, the two partners who handled domestic relations matters announced they would be leaving Wolf, prompting its Chairman to offer Petitioner a partnership in one year if she agreed to head up its domestic relations practice. (App. 26a, 125a-126a). The District Court found that this offer was made because "the legal issues which arise in the domestic relations matters handled by Wolf, Block are generally not as complex as those which arise in commercial litigation matters" and the Firm "had an immediate and pressing need to fill the vacuum which would soon be created by the impending departure" of the partners who had handled the domestic relations practice. (App. 126a at No. 138; App. 26a-27a). Previously, male associates passed over for partnership had similarly been asked "to specialize in a certain area where the need arose." (App. 26a). Also, the District Court refused to find that the domestic relations partnership offer was itself discriminatory, since Wolf's domestic relations matters were handled by male partners both before and after Petitioner rejected that offer. (App. 127a at No. 143; App. 27a at n. 14).

have a senior partner, a younger partner, and an associate(s) assigned to a case. Accordingly, requiring the plaintiff to have the ability to handle on her own any complex litigation within the firm before she was eligible to be a partner was a pretext." (App. 122a-123a at No. 121).

The Court of Appeals correctly held that this second-guessing by the District Court of Wolf's partnership standard constituted legal error:

> The district court disagreed with Wolf's decision not to overlook Ezold's deficiency in legal analysis because of her other skills and attributes, but the court is not a member of Wolf's Associates Committee or Executive Committee. Its belief that Wolf's high standard of analytical ability was unwise in light of the staffing of senior partners on complex cases does not make Wolf's standard a pretext for discrimination. (App. 43a).

The District Court impermissibly used "its own incorrect standard of comparison" and "its own subjective weighing process" when it compared certain of Petitioner's evaluations with those of eight male candidates. (App. 35a, 45a). Even though Wolf's articulated reason for not admitting Petitioner as a partner was its assessment that she was deficient in the criterion of legal analysis, the District Court's comparison of evaluations ignored that criterion. (App. 43a-45a). The Court of Appeals held that the District Court erred by "failing to consider the many negative evaluations of Ezold's legal analytic ability" as well as "the many favorable evaluations of the analytical ability of these male associates."[6] (App. 56a, 45a).

The Third Circuit determined that the District Court also erred

6. The Court of Appeals also pointed out that, besides ignoring the evaluations critical of Petitioner and favorable to the male associates in the criterion of legal analysis, the District Court excised from its selective quotations of evaluations any comments critical of Petitioner's legal analytical ability (App. 18a at n. 8, 19a at n. 9, 20a at n. 10) or favorable to the male associates. (App. 62a, 63a, 65a, 67a, 68a). In this regard, it should be noted that 91 of the 93 findings adopted by the District Court concerning the evaluations of Petitioner and the male candidates were copied verbatim from her Proposed Findings. (App. 205a at n. 29). In *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985), this Court stated that "[w]e, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties. . . ."

in a second respect: its comparisons of Petitioner's evaluations to those of the eight male candidates focused on criteria other than legal analytical ability, and it compounded that error by making these "invalid comparisons" in an improper "pick and choose" manner.[7] (App. 44a, 49a). As the Third Circuit stated: "It was not for the district court to determine that Ezold's skills in areas other than legal analysis made her sufficiently qualified for admission to the partnership." (App. 44a).

The Court of Appeals concluded that a pretext finding could not be sustained on the basis of a comparison of evaluations, because "the evaluation files contain insufficient evidence to show that Ezold was evaluated more severely than the male associates." (App. 72a). The Third Circuit stated:

> If the district court had employed the appropriate comparative analysis by focusing on whether Wolf's articulated reason of legal analysis was a pretext, it should have reached a different result. Our review of the whole record leaves us with a 'definite and firm conviction that a mistake has been committed' by the district court in its comparative analysis. *United States Gypsum Co.*, 333 U.S. at 395. The record does not show that Wolf applied its partnership admission standards unequally to male and female associates, nor that diminished ability in the area of legal analysis was an improper reason for denying admission. (App. 71a-72a).

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7. The Court of Appeals criticized the District Court for selectively quoting evaluation snippets in a manner which reflected "a conflicting double standard." (App. 49a, 52a, 53a, 64a). For instance, the District Court relied on evaluations favorable to Petitioner by partners who had little or no contact with her, yet disregarded critical evaluations by partners who had substantial contact with her. (App. 52a-54a). Moreover, the District Court relied on evaluations critical of the male associates submitted by partners who had little or no contact with them, yet disregarded evaluations critical of Petitioner by partners who likewise had little or no contact with her. (App. 52a-53a, 64a). The Petition criticizes Wolf for considering evaluations "based on third or fourth hand information" (Pet. at 5), but the District Court did not find that practice to be discriminatory in its application and the Court of Appeals emphasized that "[t]here is no evidence that Wolf's practice of giving weight to negative votes and comments of partners who had little contact and perhaps knew nothing about an associate beyond the associate's general reputation was not applied equally to female and male associates." (App. 53a, citing *Hopkins v. Price Waterhouse*, 618 F.Supp. at 1116).

After determining that the District Court's comparison of evaluations could not support its ultimate finding of pretext, the Court of Appeals went on to consider all of the other evidence relied upon by Petitioner, including evidence not credited in any findings, to determine whether there was a sufficient basis for a rational factfinder to infer pretext or discrimination. (App. 72a-93a). Its "comprehensive review of the entire record" led it to conclude that the District Court's ultimate finding of pretext is "clearly erroneous and find[s] no support in the evidence" and "there is no evidence of sex discrimination here."[8] (App. 38a, 93a).

2. Petitioner has attempted to support the District Court's ultimate finding of pretext and resulting conclusion of discrimination with several arguments that were not accepted by either the District Court or the Court of Appeals. For example, Petitioner claims that she received "inferior" assignments because she is a woman. (Pet. at 5). However, the Court of Appeals emphasized that "[b]eyond her own perceptions, however, Ezold offered no evidence showing that she was treated differently from male associates in getting assignments or exposure. The findings of the district court concerning Wolf's assignment process are in fact gender-neutral and do not support its ultimate finding of pretext." (App. 79a). The Third Circuit further stated that "[t]he district court made no finding that Ezold was given small assignments because of her sex. In fact, its findings contradict unlawful discrimination in that respect." (App. 76a). The Third Circuit concluded that "[t]his record contains no evidence that Wolf's assignment process was tainted by a discriminatory motive."[9] (App. 80a).

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8. The District Court cited four "instances of conduct" which in its view lent "support" to its ultimate finding of pretext, although "[i]t did not hold that these instances of conduct provided an independent or alternative basis for its finding. . . ." (App. 82a, 131a at No. 12). The Court of Appeals concluded that these four "instances of conduct," to the extent not set aside as "clearly erroneous," did not support the ultimate pretext finding and also were legally insufficient to permit a rational factfinder to infer pretext or discrimination. (App. 82a-88a).

9. The Court of Appeals held that the "stray remarks" cited by Petitioner (Pet. at 4, 5), made by supporters of her candidacy who were not on either the Associates Committee or the Executive Committee and "temporally remote from the date of decision" on her candidacy, were legally insufficient to "show that Wolf's evaluation of her legal ability was pretextual." (App. 77a, 86a-88a). *See*

Petitioner also points to the number of female partners at Wolf (Pet. at 3 n. 2, 15 n. 12), but the Third Circuit stressed that "[t]he district court made no finding based upon these numbers" despite Petitioner's request that it do so. (App. 80a and n. 35). The Court of Appeals noted that her "raw numerical comparisons" are "not accompanied by any analysis of either the qualified applicant pool or the flow of qualified candidates over a relevant time period," and concluded that "[w]e, like the district court, do not consider them material to Ezold's Title VII claim." (App. 81a, 82a).

Finally, Petitioner repeatedly states that she received the same grade in legal analysis as many of the male candidates in the "Committee Member's Associate Evaluation Summary" form. (Pet. at 3-4, 11, 12 n. 8, 14). However, she neglects to mention the District Court's finding that this form represents only the "personal view" of an associate's evaluations by the single Associates Committee member who summarizes them prior to the meeting of the entire Committee.[10] (App. 108a-109a at No. 53; 11a-12a). The District Court found that this form serves merely "as a starting point" for the Committee's assessment of the associate's performance and partnership candidacy, and does not reflect the ultimate consensus of the entire Committee, which is reached only after all ten members have collectively reviewed and weighed

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Price Waterhouse v. Hopkins, supra, 490 U.S. at 277 (O'Connor, J., concurring) ("stray remarks in the workplace," "statements by nondecisionmakers" and "statements by decisionmakers unrelated to the decisional process itself" do not suffice to establish discrimination). The Third Circuit also rejected as legally insufficient various alleged "stray remarks" relied upon by Petitioner on appeal but not credited in any findings by the District Court. (App. 88a-93a). It bears emphasis that Petitioner made no claim of a hostile working environment. (App. 92a).

10. Petitioner also fails to mention that her form noted that her evaluations "reflect the degree to which the reviewer considers superior intellectual ability as a prerequisite to regular partnership" and commented that her partnership candidacy turned on "a matter of philosophy on partnership admission." (Third Circuit App. 6240a-6241a). As stated above (p. 7, *supra*), the Executive Committee ultimately decided not to accept the suggestion of certain of her supporters that "the partnership standard should be relaxed in light of Ezold's other attributes." (App. 26a). Although the Appendix to the Petition purports to include a complete copy of her form (App. 181a-183a), Petitioner has omitted the second page, which contains the reference to Wolf's internal "philosophical" disagreement about her candidacy.

"hundreds of evaluations by partners with diverse views. . . ."[11] (App. 109a at Nos. 56-57; 12a-13a, 41a).

REASONS FOR DENYING THE WRIT

I. THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION BY THIS COURT OR ANY COURT OF APPEALS

A. The Third Circuit Did Not Adopt A "Special Deference" Rule For Professional Employers

Petitioner's arguments all proceed from the false premise that the Third Circuit has announced a "new rule" requiring factfinders in Title VII cases to accord "special deference" to subjective decisions by professional employers. In fact, the Third Circuit did not purport to enunciate a "special deference" rule, and nothing in its opinion can be construed as establishing any such requirement. Indeed, the only mention of either "defer" or "deference" in the Court's opinion is in its statement that "[w]e again defer to the district court's factual findings, including once more its ultimate finding, and we cannot reverse any of them unless they are clearly erroneous." (App. 38a). Thus, the Third Circuit's decision does not present the questions asserted in the Petition. (Pet. at i).

Contrary to Petitioner's hyperbole that the Third Circuit "has enacted an exemption to the equal employment laws for lawyers and other professionals" (Pet. at 20), the Court twice emphasized that subjective decisions by professional employers "are not insulated from judicial review for unlawful discrimination." (App. 42a, 51a). Belying Petitioner's assertion that the Third Circuit

11. In her effort to demonstrate that her legal analytical ability was assessed by Wolf as equal to that of the eight male candidates, Petitioner points only to this form reflecting the "personal view" of a single Committee member but she, like the District Court, ignores the following uncontroverted facts: (a) unlike the male associates, Petitioner did not receive *any* grades of "distinguished" in legal analysis from the Firm's approximately 100 partners during her last two years as an associate (App. 58a, 60a-61a); (b) unlike Petitioner, none of the male associates received a grade of "marginal" in legal analysis in his final evaluations (App. 54a, 61a); (c) even Petitioner's supporters gave her lower grades in legal analysis than they gave to the male candidates (App. 58a, 61a); and (d) Petitioner's partnership candidacy was viewed with "negative feelings" by three partners in her own Department, whereas none of the male associates' candidacies was opposed by more than one member of his own Department. (App. 69a).

now requires " 'smoking gun' proof" of discrimination in "an upper level job" (Pet. at 9), the Court reiterated its oft-expressed view that "[e]xplicit evidence of discrimination — *i.e.*, the 'smoking gun' — is not required." (App. 32a). Far from according "blind deference" to Wolf's decision not to admit Petitioner as a partner (Pet. at 14), the Court engaged in a painstakingly thorough review of the entire record to ascertain whether the findings were "clearly erroneous" and whether there was any evidence sufficient to permit a rational factfinder to conclude that Wolf's partnership decision was the product of discrimination. It reversed the District Court *not* because of a "new rule" that subjective decisions by law firms are accorded "special deference" by the Third Circuit, but instead because the Court's routine application of Rule 52(a) led it to conclude that the District Court's ultimate finding of pretext was "clearly erroneous." (App. 4a, 71a-72a, 93a).

Petitioner's argument (Pet. at 9, 14-16) that the Third Circuit's decision conflicts with "legions" of cases from other circuits that require careful review of subjective employment decisions is made up out of whole cloth. As with the supposed "special deference" rule, which is not found anywhere in the Third Circuit's opinion, Petitioner has not been able to cite or quote *any* statement in the opinion disagreeing with the principle that subjective decisionmaking should be reviewed carefully.

In fact, the Third Circuit explicitly subscribes to that cautionary principle. In this case, the Court applied that principle and cited with approval (App. 31a) its decision in *Fowle v. C & C Cola*, 868 F.2d 59, 64 (3d Cir. 1989), which agrees with the other circuits cited by Petitioner that subjective decisionmaking is "more susceptible of abuse and more likely to mask pretext. 'Subjective decision making provides an opportunity for unlawful discrimination.' " (quoting *Burrus v. United Telephone Co.*, 683 F.2d 339, 342 (10th Cir.), *cert. denied*, 459 U.S. 1071 (1982)). Moreover, Petitioner neglects to mention that, in her Petition for Rehearing, she specifically relied upon *Fowle* and *Weldon v. Kraft*, 896 F.2d 793, 798 (3d Cir. 1990), in arguing that Third Circuit precedents mandate close scrutiny of subjective employment decisions. (Rehearing Petition at 4-5, 13). By conveniently ignoring those decisions here, Petitioner is struggling to contrive the appearance of a conflict that simply does not exist.

B. The Third Circuit's Refusal To Allow Second-Guessing Of Non-Discriminatory Employment Decisions Does Not Conflict With Any Decision By This Court Or Any Court Of Appeals

Despite Petitioner's assertions (Pet. at 6), the Third Circuit's caution to District Courts to avoid " 'unwarranted invasion or intrusion' into matters involving professional judgments about an employee's qualifications for promotion" unless they "can be shown to have been used as the mechanism to obscure discrimination" (App. 42a) is not new and does not conflict with any decision by this Court or any Court of Appeals. As pointed out by the Third Circuit (App. 42a), that admonition has been expressed in a number of its cases involving Title VII challenges to tenure decisions. Indeed, this rule was first enunciated for the Third Circuit in Chief Judge Sloviter's thorough opinion in *Kunda v. Muhlenberg College*, 621 F.2d 532, 548 (3d Cir. 1980), one of the leading decisions in that area.[12]

This Court's precedents are to the same effect. In *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 198-199 (1990), Justice Blackmun's opinion for a unanimous Court declared that, "[i]n keeping with Title VII's preservation of employers' remaining freedom of choice, see *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion), courts have stressed the importance of avoiding second-guessing of legitimate academic judgments."[13]

12. The Third Circuit correctly observed that cases applying Title VII to tenure decisions are "analogous" to this case (App. 42a), and the Petition does not challenge the appropriateness of that analogy or address the many tenure cases relied upon by the Court. The analogy between law firm partnership decisions and college tenure decisions was drawn by Justice Powell in *Hishon v. King & Spalding*, 467 U.S. 69, 80 n. 4 (1984), where he cited with approval the warnings against judicial intrusion into legitimate assessments of a tenure candidate's qualifications expressed in *Kunda* and by Judge Friendly in *Lieberman v. Gant*, 630 F.2d 60, 67-68 (2d Cir. 1980). This analogy was also made by this Court in *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 194 (1990), which noted that "confidential peer reviews play an important part in partnership determinations at some law firms." In *Zahorik v. Cornell University*, 729 F.2d 85, 92-93 (2d Cir. 1984), the court enumerated the factors involved in tenure decisions which distinguish them from most other employment decisions, and each of those factors is also implicated in a partnership decision at a large law firm.

13. The Court's opinion in *University of Pennsylvania* quoted its earlier unanimous opinion in *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985), which stated that judges "may not override [an academic decision] unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional

Accord Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 999 (1988) (Although tenure criteria are "difficult to apply" and generate "much disagreement . . . in particular cases . . . [i]t would be a most radical interpretation of Title VII for a court to enjoin use of an historically settled process and plainly relevant criteria largely because they lead to decisions which are difficult for a court to review.") (quoting *Zahorik v. Cornell University*, *supra*, 729 F.2d at 96); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (Title VII "was not intended to 'diminish traditional management prerogatives.' ").

Each of the circuits cited by Petitioner which, like the Third Circuit, requires careful review of subjective employment decisions has also emphasized in tenure and similar cases involving subjective decisionmaking that factfinders must be careful not to substitute their own judgments for those of the employer. *See, e.g., Ramey v. Bowsher*, 915 F.2d 731, 735 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 1413 (1991); *Smith v. University of North Carolina*, 632 F.2d 316, 344-46 (4th Cir. 1980); *Gottlieb v. Tulane University of Louisiana*, 809 F.2d 278, 283 n. 6 (5th Cir. 1987); *Gutzwiller v. Fenik*, 860 F.2d 1317, 1331 (6th Cir. 1988); *Brousard-Norcross v. Augustana College Ass'n.*, 935 F.2d 974, 975-76 and n. 3 (8th Cir. 1991); *Carlile v. South Routt School Dist. Re-3J*, 739 F.2d 1496, 1500-01 (10th Cir. 1984).[14]

Petitioner has criticized the Third Circuit's statement that "[i]n a comparison of subjective factors such as legal ability, it must be obvious or manifest that the subjective standard was unequally applied before a court can find pretext." (App. 60a). She suggests

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judgment." *Accord Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90, 92 (1978) (In rejecting a medical student's due process challenge to her dismissal, the Court "warn[ed] against any such judicial intrusion into academic decisionmaking," which is necessarily "subjective and evaluative.").

14. Other circuits, not cited by Petitioner, have likewise stressed the importance of avoiding second-guessing of tenure decisions challenged under Title VII. *See, e.g., Villanueva v. Wellesley College*, 930 F.2d 124, 129 (1st Cir.), *cert. denied*, 112 S. Ct. 181 (1991); *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 345-46 (1st Cir. 1989), *cert. denied*, 496 U.S. 937 (1990); *Kumar v. Board of Trustees, University of Massachusetts*, 774 F.2d 1 (1st Cir. 1985), *cert. denied*, 475 U.S. 1097 (1986); *Zahorik v. Cornell University*, 729 F.2d 85, 91-94 (2d Cir. 1984); *Lieberman v. Gant*, 630 F.2d 60, 67-68 (2d Cir. 1980); *Namenwirth v. Board of Regents of University of Wisconsin System*, 769 F.2d 1235, 1242-43 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986); *LaBorde v. Regents of University of California*, 686 F.2d 715 (9th Cir. 1982), *cert. denied*, 459 U.S. 1173 (1983).

(Pet. at 14) that this statement "comes perilously close" to the "clear and convincing" standard rejected by this Court in *Price Waterhouse v. Hopkins*. Once again, Petitioner has mischaracterized the Third Circuit's opinion, which does *not* set forth or apply a "clear and convincing" test but instead plainly states that the plaintiff "must prove, *by a preponderance of the evidence*, that the defendant's proffered reasons were a pretext for discrimination." (App. 30a) (emphasis added). In its opinion (App. 60a), the Third Circuit agreed with the First Circuit's decision in *Villanueva v. Wellesley College*, 930 F.2d 124, 129 (1st Cir.), *cert. denied*, 112 S.Ct. 181 (1991), which held that, in order to prevent impermissible substitutions of judicial tenure decisions for those of the university, a plaintiff attempting to establish pretext through a "comparative analysis" of tenure candidates "must convince a trier of fact, *by a preponderance of the evidence*, that the defendant's articulated reasons for denying tenure 'were obviously weak or implausible,' or that the tenure standards for prevailing at the tenure decisions were 'manifestly unequally applied.' " (emphasis added). Thus, Petitioner's assertion that the Third Circuit's decision "comes perilously close" to establishing a "clear and convincing" standard is unfounded.

C. The Third Circuit Did Not Apply Rule 52(a) In Conflict With Any Decision By This Court Or Any Court Of Appeals

Petitioner's claim (Pet. at 18) that the Third Circuit's decision effectuates "the wholesale repeal of Rule 52 for cases involving subjective employment decisions affecting lawyers and other professional employees" is groundless. Contrary to Petitioner's assertions (Pet. at 8, 11-12, 16), the Court did not create a "new standard" for appellate review of such decisions, nor did it hold that a factfinder "must surgically separate" comparative evidence from other types of evidence. (*See* App. 33a, 73a-74a, 88a). Instead, the Court of Appeals properly fulfilled its obligations under Rule 52(a) in conformity with well-settled principles enunciated by this Court. The Third Circuit expressly stated that the District Court's findings, including its ultimate finding of pretext, could not be set aside unless they were "clearly erroneous," and that "[w]hen there are two permissible views of the evidence, the district court's choice of one view cannot be clearly erroneous." (App. 37a, citing *Anderson v. Bessemer City, supra*, 470 U.S. at 574). As the Court of Appeals stated, it viewed the evidence in

the light most favorable to Petitioner (App. 38a, 90a), and in the few instances where there was conflicting testimony, the Court deferred to the District Court's resolution of those conflicts. (App. 8a, 77a, 86a).

Petitioner argues that the Court of Appeals erred when it supposedly "credited" the many evaluations critical of her legal analytical ability, which she claims had been "discredited" and therefore properly ignored by the District Court.[15] (Pet. at 7, 17). However, the Third Circuit did not "credit" any evaluations or engage in *de novo* fact-finding. Instead, it correctly stressed that "the district court never made a finding that the critical evaluations were themselves incredible or a pretext for discrimination." (App. 53a). Indeed, the District Court made no mention of the evaluations critical of Petitioner's legal analytical ability, much less did it "discredit" any of them. Therefore, the Third Circuit concluded that the District Court's disregard of Petitioner's negative evaluations "cannot be excused" and her "contention that the district court did not have to consider these negative comments lacks merit." (App. 53a).

Although Petitioner criticizes the Third Circuit for "comb[ing] the extensive record" (Pet. at 9), in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984), this Court stated that "a review of the entire record" by the appellate court was "expressly contemplated" by its seminal decision construing Rule 52(a), *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The Third Circuit performed precisely such a review, and set aside the District Court's ultimate finding of pretext as "clearly erroneous." Similarly, the Third Circuit's entry of judgment in favor of Wolf, premised on its determination that

15. The Petition concedes that the District Court's comparison of evaluations was based on criteria other than legal analysis (Pet. at 13-14), yet it also inconsistently (and incorrectly) asserts that the District Court focused on the criterion of legal analysis. (Pet. at 3, 8). The Third Circuit correctly held that the comparative analysis should have focused on the criterion of legal analysis. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (disparate treatment not shown "if *this criterion* is applied alike to members of all races") (emphasis added); *Price Waterhouse v. Hopkins, supra*, 490 U.S. at 236; 618 F. Supp. at 1112 (although evaluation forms contained 48 evaluation criteria, comparative analysis was focused on criterion of interpersonal skills, since Hopkins' deficiency in that criterion was the articulated reason for partnership decision).

there was insufficient evidence to permit a rational factfinder to infer pretext or discrimination, was fully consistent with this Court's statement in *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982), that a remand is unnecessary where "the record permits only one resolution of the factual issue."[16] *See, e.g., Bigelow v. Virginia*, 421 U.S. 809, 826-27 (1975).

II. THE THIRD CIRCUIT'S DECISION NEITHER PRESENTS ANY NOVEL ISSUES NOR EXEMPTS THE PROFESSIONS FROM TITLE VII

In addition to her makeweight argument that the Third Circuit's decision creates a conflict, Petitioner contends that certiorari is warranted because the decision will render Title VII a "dead letter" in the professional context. (Pet. at 19-20). This unfounded argument is amply refuted by the opinion itself, which emphasized that subjective decisions by professional employers are *not* insulated from scrutiny under Title VII (App. 42a, 51a), and, in fact, scrutinized the record with great care to determine whether there was any evidence sufficient to permit an inference of pretext or discrimination.

Contrary to Petitioner's prediction that the well-settled legal principles applied by the Third Circuit will "effectively guarantee that the employer will prevail in any discrimination case involving professional employees" (Pet. at 9), the application of those same principles over the past two decades has led to judgments for professional employees in a number of Title VII cases in the Third Circuit and other circuits where, unlike here, those employees satisfied their burden of proving discrimination.[17] Thus, the Third

16. Since the Third Circuit concluded that there was no evidence that would support a finding of pretext or discrimination, this case is not affected by this Court's recent holding that a finding of pretext is itself insufficient to mandate a finding of discrimination. *St. Mary's Honor Center v. Hicks*, U.S. , 61 U.S.L.W. 4782 (June 25, 1993). Petitioner's evidence failed to satisfy the less stringent, pre-*Hicks* Third Circuit rule equating pretext with discrimination, *id.* at 4785, citing *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395-1396 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984), and therefore it follows *a fortiori* that the evidence is insufficient to satisfy *Hicks*' requirement that plaintiff prove the employer's articulated reason was a pretext *for* discrimination.

17. *See, e.g., Bennun v. Rutgers State Univ.*, 941 F.2d 154 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 956 (1992); *Kunda v. Muhlenberg College*, 621 F.2d 532 (3d

Circuit's conclusion that Petitioner did not satisfy her burden of proving discrimination in this case does not portend the death knell of Title VII's protections for professional women and minorities whose claims are meritorious.

There can be no doubt that the Third Circuit shares the desire of Congress to remove discriminatory barriers to the advancement of women in the professions, *i.e.*, the "glass ceiling." That laudable goal, shared by Wolf as well, does not provide a proper basis for imposing liability where the record contains no evidence of discrimination but instead shows that the challenged employment decision was based on a legitimate, non-discriminatory reason. The Third Circuit's opinion, which applies well-settled Rule 52(a) principles to the particular facts and findings in this case, will neither eviscerate Title VII in the professional workplace nor impede the ability of women and minorities to prevail in cases where there is evidence sufficient to support a finding of discrimination.

CONCLUSION

The Third Circuit's fact-bound decision does not plow any new ground, does not conflict with any decision by this Court or another Court of Appeals, and will not vitiate Title VII in the professional workplace. Accordingly, for the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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